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MOTION FILED

DEC 2 9 2003

No. 03-771

In the

Supreme Court of the United States

ELLINORA V. CAGNA, in her capacity as Executrix of the Estate of Leo Cagna, deceased and in her own right

Petitioner,

v.

WEIRTON STEEL CORPORATION RETIREMENT PLAN-PLAN 001; RETIREMENT COMMITTEE OF THE WEIRTON STEEL CORPORATION RETIREMENT PLAN-PLAN 001; WEIRTON RETIREMENT PROGRAM-PLAN 056; RETIREMENT COMMITTEE OF THE WEIRTON STEEL CORPORATION RETIREMENT PROGRAM-PLAN-056; NATIONAL STEEL CORPORATION WEIRTON RETIREMENT PROGRAM; RETIREMENT ADMINISTRATIVE BOARD OF THE NATIONAL STEEL CORPORATION WEIRTON RETIREMENT PROGRAM,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE WOMEN'S INSTITUTE FOR A SECURE RETIREMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE OF COURT BY THE WOMEN'S INSTITUTE FOR A SECURE RETIREMENT TO FILE AN *AMICUS CURIAE* BRIEF

Pursuant to Rule 37 of the Supreme Court of the United States, Motion is hereby made to file the foregoing Brief of the Women's Institute for a Secure Retirement ("WISER") as *amicus curiae* in support of Petitioner:

1. WISER desires file an amicus curiae brief in the foregoing matter

2. By the letter dated December 19, 2003, legal counsel for *amicus* has sought the consent of all the parties to file an *amicus curiae* brief in accordance with Rule 37 of the Supreme Court of the United States.

3. Petitioner has consented in writing to the filing of such brief which letter dated December 23, 2003 has been filed with the Clerk of this Court.

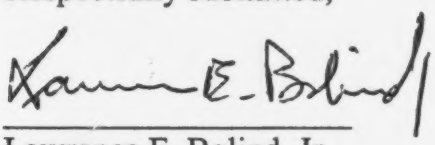
4. Neither Respondent has consented to the filing of the *amicus curiae* brief.

5. The undersigned has filed his application to this Honorable Court on December 23, 2003, which application is pending.

WHEREFORE, the undersigned on behalf of WISER, hereby respectfully requests that the attached Brief of the

Women's Institute for a Secure Retirement as *Amicus Curiae* in Support of Petitioner be accepted.

Respectfully submitted,



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BRIEF OF THE WOMEN'S INSTITUTE FOR A SECURE RETIREMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Women's Institute for a Secure Retirement ("WISER") respectfully submits this *amicus curiae* brief in support of the Petitioner Ellinora V. Cagna. Correspondence reflecting the Petitioner's consent to the filing of *amicus curiae* brief has been filed with the Clerk of Court.[1] However, neither Respondent has consented to the filing of this brief, thus, a Motion for Leave of Court to File an *Amicus Curiae* Brief has been included herewith.

INTEREST OF *AMICUS CURIAE*

WISER is a nonprofit organization founded in 1996 which focuses exclusively on increasing awareness of the structural barriers that prevent women from fair participation in the nation's retirement systems. WISER strives, through education, to improve women's opportunities to achieve a secure retirement. WISER is a national organization which was created by The Teresa and H. John Heinz III Foundation. Since 1996, WISER has received financial support from numerous individual donors and a host of charitable foundations. In 1998, WISER was awarded a highly competitive grant from the U.S. Administration on Aging. WISER is an outgrowth of the Women's Retirement Initiative. The Women's Retirement Initiative is part of the Philanthropies' continuing effort to raise the profile of critical issues relating to pensions and retirement savings, particularly with respect to women. WISER is the nation's only nonprofit organization wholly devoted to providing women with the critical skills and information needed to improve their

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation and submission of this brief.

economic circumstances and plan for a financially sound retirement.

Under a defined benefit plan, employees are given the option of various payment methods at retirement. According to data on benefits from the National Compensation Survey, in 2000 virtually all employees covered by a defined benefit plan were given the option of a joint and survivor annuity.[2] Blostin, *Payment Options under Retirement Plans*, Bureau of Labor Statistics, April 28, 2003 at 1.

Surviving spouses across the United States have a vital interest in the issues raised in this case given the tremendous number of women who, at sometime during their lives, will become a surviving spouse of an American worker covered by a privately maintained pension plan. During 2003, approximately 20 million American workers were covered by private pension plans containing the ERISA mandated qualified joint and survivor annuity ("QJSA"). *Employee Benefits Survey*, Incidence of Defined Benefit Pension, United States Department of Labor, Bureau of Statistics. The Weirton Steel Corporation Retirement Plan, one of the respondents in this case, covers approximately 3,500 active employees and 10,000 retirees and their dependents. *The Charleston Gazette,* October 22, 2003 at 1, col. 1. The number of American workers and their spouses affected by the issues in this case is unquestionably substantial. Furthermore, women are especially affected by the issues raised in the petition because women tend to live longer than men and men tend to marry younger women. Moreover, women are five times more likely to become

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[2] Under ERISA § 1055, defined benefit plans must make a qualified joint and survivor annuity the normal form of benefit payment for married participants. This method of payment provides the surviving spouse at least one-half of the amount of the employee's benefit during the course of the lifetime.

widowed than men. Forman, *Pension Benefits for Widows*, The Journal Record, January 5, 1999 at 5.

Because of the importance of these issues to WISER and to surviving spouses across the United States, WISER respectfully submits this brief urging the Court to grant the petition for certiorari, reverse the decision below, and require pension plans to comply with the Employee Retirement Insurance Security Act of 1974 ("ERISA"), the Internal Revenue Code of 1986, as amended (the "IRC") and the implementing treasury regulations, especially providing a written explanation as to the financial effects of waiving a QJSA.

REASONS FOR GRANTING THE WRIT

The petition in this case presents two vital questions of importance to American workers who participate in privately operated employee benefit plans. Is a pensioner's waiver and a spouse's consent to such waiver valid if the ERISA fiduciary fails to comply with the disclosure requirements contained under ERISA? Is it necessary for a surviving spouse to prove she detrimentally relied on the inaccurate financial information provided by the ERISA fiduciary in order to succeed in her claim for a share of the ERISA-mandated Qualified Joint and Survivor Annuity?[3] The decision below is fundamentally at odd with ERISA, the IRC and the governing regulations as they apply to pensioner's waiver of, and a spousal consent to, a QJSA offered by a private pension plan. In order to ensure full

[3] It should be noted the second question presented in the petition for certiorari is virtually the same as the question presented in *Burke v. Kodak Retirement Income Plan and Kodak Retirement Income Plan Committee*, 336 F.3d 103 (2d Cir. 2003), petition for cert. filed, October 17, 2003 (No. 03-565). Thus, even the current petitions pending before this Court evidence the fact that this issue will continue to recur unless resolved by this Court.

disclosure of spousal rights to benefits, federal statutory and regulatory requirements must be strictly applied.

The Third Circuit decision below not only goes far beyond that of any other circuit that has addressed both issues raised in the petition, it also directly contravenes the purpose of REA. Congress intended a surviving spouse automatically receive a 50% share of the QJSA unless certain rigorous requirements were met in obtaining a participant's waiver of the QJSA and spousal consent thereto. See ERISA § 1055(c) and IRC § 417. It is inconceivable that Congress and the Treasury intended that a surviving spouse meet any standard of proof when an ERISA fiduciary fails to follow the federal requirements for validly effectuating a waiver of the ERISA mandated QJSA and certainly not a strict standard such as the detrimental reliance standard invoked by the Third Circuit decision below. There is no indication in the text or history of the REA amendments to ERISA that any modicum of proof be imposed on a surviving spouse to succeed in a claim for a share of the QJSA. The Court should grant this Petition to resolve the sharp conflict among the circuits, to confirm the spousal rights intended under REA and to make clear that detrimental reliance is not a prerequisite to a spouse's recovery of her share of the QJSA.

A. Certiorari Should Be Granted to Resolve the Existing Circuit Splits on the Two Questions Raised in the Petition and Establish Nationwide Uniformity on Issues Directly Affecting a Surviving Spouses Rights Under ERISA

The petition clearly demonstrates the sharp division among the circuits on the two questions presented in this case. The first question is addressed at length in the petition and will be only briefly discussed here. At least nine circuits have addressed the second question presented in the petition applying an array of different legal standards.

The inconsistency among the circuits on the question of an ERISA fiduciary's failure to comply with the disclosure requirements specified in ERISA § 1055, IRC §§ 401(a)(11), 417 and the governing treasury regulations flagrantly ignores the congressional and treasury mandate in providing a spouse with protection from an unwitting consent to a waiver of the QJSA. After being on the books for nearly 20 years, the breadth and scope of the spousal rights created under the Retirement Equity Act of 1984 is now squarely before the Court. WISER submits that the need for Court review in this case is amplified, since most surviving spouses lack the financial means or knowledge to enforce their rights under ERISA in the federal courts. The Court may not have the opportunity again to confirm the Congressional and Treasury mandate contained in ERISA § 1055, the IRC and the governing regulations intended by REA.

The inconsistency among the circuits on the second petition question of whether detrimental reliance or the prejudicial standard should apply to a beneficiary's claim will clearly repeat itself unless this Court resolves the conflict. *See Burke v. Kodak Retirement Income Plan and Kodak Retirement Income Plan Committee* , 336 F.3d 103 (2d Cir. 2003), petition for cert. filed, October 16, 2003 (No. 03-565). While the answer to this federal question lacks a clear congressional mandate, applying the detrimental reliance standard to a surviving spouse's claim for her share of the QJSA is illogical. This Court should ensure the circuits do not undermine the legislative command and treasury efforts by imposing technical requirements on participants and their spouses which requirements are virtually impossible to meet. See *Edwards v. State Farm Mutual Ins. Co.* 852 F2d. at 134, 137 (6th Cir. 1988).

This Court has acknowledged the unique importance of ensuring uniformity and certainty under ERISA, given "the

comprehensive nature of the statute, the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force." *Boggs v. Boggs*, 520 U.S. 833, 839 (1997). ERISA was enacted specifically to supplant the common-law system of varying state-by-state regulation of employee benefit plans with a single federal regulatory scheme, to provide beneficiaries of such plans a measure of stability and security in the enforcement of the laws governing employee benefit plans. As this Court advised:

> An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987).

ERISA thus reflects a "congressional mandate for the uniform and comprehensive regulation" of employee benefit plans. *Boggs*, 520 U.S. at 836. Ensuring a system of "nationally uniform plan administration" is a core . . . concern" of the statute. *Egelhoff v. Egelhoff*, 532 U.S. 141, 147-148 (2001).

This case has the unique quality of proposing two separate questions upon which the circuits are in disarray. The current stark inconsistencies among the circuits as to the breadth and scope of a surviving spouses rights under ERISA

ignores the congressional and regulatory mandate and the chief concerns congress contemplated when it adopted REA. Given the severe financial restrictions on most surviving spouses, we will never know how many surviving spouses have been unable to enforce their ERISA rights, since many surviving spouses do not have the financial means to bring and maintain a case in the federal courts. Further, absent a mandate by this Court, pension plan fiduciaries will continue to be careless about the financial disclosures made to a participant and spouse at the time of retirement, since some of the circuits are not strictly enforcing the ERISA § 1055 required disclosures. A surviving spouse's success in recovering a share of the QJSA may depend upon which circuit the spouse lives or where the spouse elects to sue. This is patently unfair.

The split among the circuits on the second question presented in the petition is even wider and deeper, as virtually every circuit has had an opportunity to issue its own rule of law. Suffice it to say that review in this case is especially urgent given substantial number of Americans affected by the issues raised in this case upon which the circuits are in sharp divergence.

B. ERISA Requirements Underlying A Valid Waiver Of A QJSA Should Be Strictly Enforced And Proof Of Detrimental Reliance Should Never Be Required Of A Surviving Spouse To Recover A Share Of The QJSA Since Detrimental Reliance is a Concept Under Contract Principles Rather than Fiduciary Trust Principles

As the Petition correctly states, the Third Circuit decision below takes the unprecedented step of extending the detrimental reliance standard to a surviving spouse's claim for her ERISA-mandated QJSA. The detrimental reliance standard usually is applied to a plaintiff seeking to obtain

benefits on the basis of statements or omissions in the summary plan description, and usually in the context of a conflict with the underlying plan documents. Under the Third Circuit's novel interpretation of the REA amendments to ERISA, few, if any, surviving spouses could recover a share of the ERISA mandated QJSA which has been unwittingly waived by a pensioner.

The Third Circuit decision below fails to appreciate the REA amendments to ERISA in a manner incompatible with the statutory and regulatory scheme specified in ERISA, the IRC and the governing regulations. At a minimum, the surviving spouse should be given a written explanation of the benefits that are being waived. If this does not occur, any waiver of the QJSA, and consent to such waiver is not an informed one. This Court and well as federal courts across the country has a plethora of precedent in other areas of the law requiring sufficient explanation and disclosure to enable a person to make an knowing and intelligent decision. See for example *Zinermon v. Burch*, 494 U.S. 113, 123 (1990). Further, the Treasury regulations contemplate that a participant's consent be knowing by requiring the written explanation the Third Circuit concluded was lacking. 26 C.F.R. § 1.417(e)-1(2)(i) provides in pertinent part, that "No consent is valid unless the participant has received a general description of the material features, and an explanation of the relative values of, the optional forms of benefit available under the plan . . ."

The equitable principle of promissory estoppel and the use of the detrimental reliance standard may be appropriate for extra plan benefits promised under a summary plan description, but certainly that standard is not applicable to spousal benefits guaranteed under ERISA § 1055. The conclusion that, in enacting REA, Congress intended a surviving spouse must detrimentally rely on the plan fiduciaries' failure to provide a written explanation in a

pensioner's retirement election form is fundamentally at odds with the congressional judgments reflected in ERISA and the IRC. This is not a case of extra-plan benefits based upon a summary plan description, but survivor income benefits mandated under ERISA. These survivor income benefits are automatic under ERISA unless a knowing waiver and consent is obtained from a participant and spouse.

With specific regard to the case at bar, no trial occurred since the case was decided on summary judgment by the district court and affirmed by the Third Circuit. Thus, no finding of fact was ever made with respect to whether petitioner relied on the fiduciaries incomplete disclosures or whether petitioner would have refused to consent to a waiver of the QJSA had complete disclosure be made.

The most glaring defect in the Third Circuit's reasoning is its application of contract principles rather than trust principles to govern whether a surviving spouse is entitled to her share of the QJSA. Detrimental reliance has its genesis in the promissory estoppel area of contract law. However, the genesis of ERISA's fiduciary standards is in the common law of trusts, Congress plainly intended the courts to apply under ERISA the same standard of review that prevails under trust law. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981); see *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Gilbert v. United States*, 370 U.S. 650, 655 (1962). The Third Circuit decision below improperly places the burden of proof on the surviving spouse, rather than on the ERISA fiduciary. In the case at issue, the pension plans never complied with the federal statutory and regulatory requirements of a clear and comprehensible written explanation of the effects of a waiver of a QJSA. The fiduciary prepared and presented the form containing the retirement options. The Third Circuit's failure to discuss the other federal cases decided under ERISA § 1055 and its reliance on *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 73

(3d Cir.2001), a case which did not involve ERISA§ 1055 is not only absurd, but also patently unfair.

The importance of the fiduciary duties under ERISA when presenting retirements to a retiree and the nonparticipant spouse is without question. Justice Cardozzo's now famous articulation of the fiduciary obligation captures the essence of the duty owed to retirees and their spouses:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 546 (1928).

It cannot be clearer that fiduciary obligations require ERISA fiduciaries, at a minimum, to follow the federal statutory and regulatory guidelines in disclosing retirement benefit options to retirees and their nonparticpant spouses.

The option form prepared and presented to Leo and Ellinora by the Weirton Steel and National Steel plan is faulty as a matter of law and, therefore, Leo's waiver and Ellinora's consent is ineffective under ERISA § 1055. However, if as the Third Circuit suggests, it is relevant for Ellinora to prove what Leo would have elected to do had full disclosure been made, to require a showing of detrimental reliance imposes an insurmountable burden on a surviving spouse. Because Leo has died, Ellinora cannot ask him whether he relied on the faulty form to show detrimental reliance. When detrimental reliance cannot be proven, possible or probable prejudice is

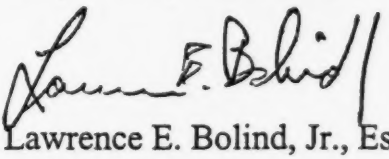
the standard. See, e.g. *Manganaro v. Welfare Fund of Local 771*, 21 F. Supp. 2d 284, 296 (S.D.N.Y. 1998).

The current inconsistencies evidenced by the circuits in enforcing spousal rights disserves REA, the implementing treasury regulations and the entire body of work which has evolved. Allowing the circuits to inconsistently enforce spousal rights to a share of the QJSA will result in undeserved windfalls to privately maintained pension plans at the expense of unwitting participants and their spouses.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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December 26, 2003